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LABOR AS A PERSONAL OR A PROPERTY RIGHT.

A statute passed by Massachusetts Legislature in 1914 and lauded by the Executive Council of the American Federation of Labor in 1914, as "Massachusetts Model Labor Law," has been declared unconstitutional by Massachusetts Supreme Judicial Court, in a suit by one labor union against another labor union. Bogni v. Perotti, 112 N. E. 853.

This statute declared, among other things, that the right to do work or labor "shall be held and construed to be a personal and not a property right," and "no injunction shall be granted but the parties shall be left to their remedy at law" in all disputes between employer and employe. Also it declared that it would not be unlawful for persons employed to combine to obtain increase of wages or to better their condition.

It was urged in this case that "plaintiffs being laborers and the statute having been passed for the benefit of laborers, the plaintiffs as such are not in a position to question its constitutionality," but this contention is disposed of quite curtly by the statement that the bill for injunction "set forth a plain wrong done" to plaintiffs by defendants. This objection rightly should weigh very little, if generally a statute lacks constitutionality, for merely good, but mistaken, intentions by a legislature ought not to count for much. Nevertheless the fact is worth noting, as showing that the Massachusetts court cannot be accused of favoring employer against employe in its conclusion, but as standing indifferent between the litigants.

This opinion, a unanimous decision by the court, goes upon the theory, that the statute attempts to create a very serious discrimination against the laboring man. Thus it is said: "If a laborer must stand helpless in a court while others there receive protection respecting the same general subject which is denied to him, it cannot be said with a due regard to the meaning of constitutional guarantees that he is afforded 'the equal protection of the laws' within the Fourteenth Amendment to the Constitution of the United States. The right to make contracts to earn money by labor is at least as essential to the laborer as is any property right to other members of society."

If this statute had confined itself to relations between employer and employe, this reasoning might seem like the labor unions had been "hoist by their own petard," but the statute also embraces cases "between persons employed and persons seeking employment."

Generally, it may be said, that the statute is an attempt to declare that "the right to enter the relation of employer and employe" is "a personal and not a property right" and, perforce such declaration, to declare a new rule of law with regard thereto.

The court says: "It was settled that the right to labor and to make contracts to work is a property right by Adair v. U. S., 208 U. S. 161, and Coppage v. Kansas, 236 U. S. 1, and controversy on that subject must be regarded as put at rest by those decisions. One cannot be deprived of that right by simple mandate of the Legislature."

It is further said that this kind of a declaration would amount to confiscation "under the guise of a statute," and "it is manifest that something recognized as property by the law of the land cannot be extinguished utterly."

All of this is in regard to changing the ordinary rule as to one possessed of a property right to obtain relief by in-

junction through application to a court of equity.

If we regard labor unions as binding labor generally in legislation intended for amelioration of conditions, this decision is something of a boomerang. As a matter of fact, however, the mere right of organization is not the right of laboring men to erect themselves into an agency, even, one might suppose, for the members of particular unions.

We do not regard the decision by Massachusetts court as a hardship on labor so much as a restraint upon the self-created representatives of all labor, whether unionized or not.

NOTES OF IMPORTANT DECISIONS.

MASTER AND SERVANT—SERVICES TO SATISFACTION OF EMPLOYER.—In 83 Cent. L. J. 37, we noticed a case of an employment contract with services to be performed to the satisfaction of employer, in which it was held that the latter had absolute discretion to discharge the servant if he really was dissatisfied, this decision being by Sixth Circuit Court of Appeals.

In Hanaford v. Stevens & Co., 98 Atl. 209, decided by Supreme Court of Rhode Island, it is held, that a contract of employment does not come under the rule of contracts involving personal taste or feeling, and that the employer, where there is a time contract for services, cannot discharge in advance of its expiration, unless the employer has reasonable cause for dissatisfaction.

It was said: "We do not think that the contract now in question, relating to the services of a traveling salesman is one involving matters of personal taste or feeling. It seems to us that the personal element upon which that class of cases rests is lacking in the case at bar."

It hardly would seem that there only ought to be two classes of contract as to work to the satisfaction of another. Personal taste or feeling as spoken of refers to work done and work where no element of taste or feeling is involved. There should be a rule as to employment contracts where there is continuing service. While we agree that an employe should not be subject to discharge at the mere whim of an employer, yet the rule as to reasonable ground for discharge should be more lax than where there is merely a question of accepting or rejecting work fully completed and tendered for acceptance. Employment in a satisfaction contract may not involve taste and yet it could approach very closely to feeling, as the employment does not contemplate that an employe is like a mere piece of machinery. Relations between employer and employe should be reasonably regarded.

DAMAGES—PUNNING UPON A MAXIM OF THE LAW.—In Martin v. Waycross Coca-Cola Bottling Co., 89 S. E. 495, Georgia Court of Appeals, treats of a non-suit under the maxim "de minimis non curat lex."

This case concerned damages for nausea caused to plaintiff from partaking of coca-cola in which, after the first swallow, she saw a dead rodent. With a detail so graphic as to be almost as nauseating to the reader as the partaking of the beverage was to the drinker, the court concludes its reasons for a reversal as follows: "That the plaintiff in the present case was cured of the effect caused by the rodent whose ghastly condition is portrayed in the testimony does not necessarily make this a case in which the Latin 'curat' is synonymous with cure rat or rat cure."

As this is a comment and there is not granted to us the same immunity as to a judge in writing an opinion, we refrain from endeavoring to state the matter more strongly, for fear our readers might have a case of nausea against us.

CORPORATION — RATIFICATION OF AGREEMENTS BY PROMOTERS TO PAY SOLICITORS FOR STOCK SUBSCRIPTIONS.—In order to pay for expense of organization, including percentage to solicitors on stock subscriptions, a plan was evolved to offer stock of the par value of $100 at $125. There being a greater net sum raised by this method than the stock at par would have amounted to, St. Louis Court of Appeals held that the corporation had the right to ratify the arrangement of the promoters. Royal Casualty Co. v. Puller, 186 S. W. 1099.

The court reasons that this in no way impairs capital and the corporation accepting the benefit from solicitors' labors done in pursuance to the plan of the promoters could pay the commission out of the price of shares above par.

The difficulty which seems to us to exist in the court's conclusion lies in the fact that

capital is estimated at par value when the stock subscribed for was purchased at a premium paid therefor, this premium to go to the corporation. Certainly, it seems, that the court, from its reasoning, would have declared any ratification ineffective which would have reduced the capital stock below par of all the stock subscribed for. The arrangement was an effort to avoid the requirements of the statute, but how is it allowable to say, that any part of subscription to stock may not be deemed capital? If one pays $200 for stock, whose par value is $100, and all are charged this sum, is the capital the aggregate of shares multiplied by $200 or $100? Possibly there is a surplus, but is surplus created for corporate needs essentially different from statutory capital? And is surplus created in this way the same as surplus laid by out of profits made by a corporation after it has been organized?

To show how the promoters' arrangement worked, one of them was allowed to charge a percentage on his own unsolicited subscription. Was he not estopped from claiming such percentage, because any subscriber paying the full price without any discount would be contributing beyond his proportion? And would not the corporation be forbidden to recognize this inequality?

PRIVATE RIGHTS AND ADMINISTRATIVE DISCRETION.*

In order to obtain an adequate understanding of the private rights of individuals on the one hand and of the extent of administrative discretion on the other hand, it is necessary to examine in some detail both the methods of administrative action and the judicial remedies which are open to the individual claiming himself aggrieved by that action.

Administrative methods and judicial remedies will on such an examination be found to be much less dependent on constitutional limitations than is perhaps ordinarily supposed. These limitations are, as interpreted by the courts, directed rather to legislative than administrative action. They prevent the legislature, for example, from declaring that to be a nuisance which in the opinion of the court is not a nuisance, but once the character of nuisance is admitted, they permit of the most drastic action in its abatement on the part of the administration. Constitutional limitations do, of course, indirectly limit administrative activity in so far as that activity is based upon legislation, since the legislature may not grant to administrative authorities a power which it does not in itself possess. But, apart from such a limitation, constitutional provisions do not seriously affect many forms of administrative activity. We may, therefore, almost leave out of consideration the private rights provisions of American constitutions in the treatment of our subject.

I have said that our attention must be directed both to administrative methods and to the judicial methods available. Let us now take up one by one the most important methods by which administrative authorities act, and consider at the same time the remedies open to the individual who deems himself aggrieved by that action.

I. *Administrative Regulations.* — The first method of administrative action to which I wish to call attention is that of regulation. The characteristic of this method is that it attempts to affect the relations of private individuals through the promulgation of rules of conduct of general application. In general, it may be said that few, if any, administrative authorities have in accordance with American law the right to issue such regulations in the absence of statutory authorization to that effect.[1] On the other hand, it is just as true that there are a great number of administrative authorities to which such a power of regulation has been given by legislation. This is so, notwithstanding it is the theory of our

*This was the subject of the interesting argument made by Hon. Frank J. Goodnow, of Johns Hopkins University, at the meeting of the American Bar Association, Sept. 1, 1916. It is reprinted here with permission. It will amply repay a careful study.—Editor.

(1) Potts v. Breen, 167 Ill. 67.

law that our legislatures may not delegate legislative power. For our courts have commonly held constitutional statutes granting to administrative authorities the power to regulate the details which must be regulated in order that much legislation may be made really effective.[2] It is also constitutional for the legislature to delegate to administrative authorities the power to impose criminal penalties for the violation of administrative regulations.[3] And it is often the case that a provision of the penal code or some other statute specifically provides penalties for the violation of administrative ordinances. Indeed, without any such provision of law it is competent for local corporations both to issue local ordinances or by-laws and to provide penalties in the nature of fines which may be recovered in an action for debt.[4]

Where a provision of statute clearly authorizes an administrative authority to promulgate such regulations, it is seldom the case that its discretion in the exercise of its regulatory powers is subject to any control. Of course, as has been said, the legislature may not delegate to an administrative authority a power which it does not itself possess. Any attempt on the part of an administrative authority to enforce a regulation which it has not the power to make may in the proper method be rendered nugatory by the courts. But so long as an administrative authority keeps within the power which has been constitutionally delegated to it, its discretion in the exercise of its power of regulation is not subject to effective control. It is seldom that a regulation, to be valid, needs the approval of any superior administrative authority. It is almost never the case that a regulation issued by an administrative authority is laid before the legislature for its action, as frequently happens in Great Britain. The only possible control which may be exercised over the discretion of an administrative authority in the issue of regulations is exercised by the courts through their power to declare void as unreasonable a regulation which is not clearly within the power possessed by the authority issuing it. As in not a few instances the power of regulation is granted in general terms, it is often within the jurisdiction of the courts thus to declare void as being unreasonable a regulation of an administrative authority. Where, however, the power to promulgate the particular kind of regulation at issue is certain, the question of its reasonableness is regarded as settled. The courts may not declare it void as unreasonable any more than they may declare a statute of the legislature void for the same reason.[5]

We may say, then, that for most practical purposes:

First: Administrative authorities may and do possess wide powers of regulation; and

Second: The exercise of the regulatory power of administrative authorities is not, in very many important cases, subject to an effective control.

Both of these statements are true, notwithstanding the fact that these regulations are frequently adopted without any public hearings, by authorities organized in such a way that debate with regard to these regulations is impossible. The result is that it is not infrequently the case that the only view which receives expression in ordinances or regulations issued is the official view.

Furthermore, it is not seldom the case that regulations are adopted and enforced without adequate publication. For it is by no means clear that the law requires publication as a necesary prerequisite to the validity of an ordinance or regulation.

The individual is thus not sufficiently protected, either through the procedure re-

(2) Buttfield v. Stranahan, 192 U. S. 470; Health Department of City of New York v. Rector, etc., of Trinity Church, 145 N. Y. 32.

(3) O'Hover v. Montgomery, 120 Tenn. 448.

(4) Mayor of Mobile v. Yuille, 3 Ala. 137.

(5) O'Hover v. Montgomery, 120 Tenn. 448, 467.

quired as a preliminary to the adoption and issue of regulations, or through the methods of control provided against the arbitrary use of discretion by administrative authorities in the exercise of their powers of regulation.

II. *Administrative Action of Individual Application.*—The second method of administrative action consists in the taking of action which affects some particular individual case.

The number of these orders or decisions of individual application, as they are sometimes generally called, is legion and their variety is very great. We may perhaps, however, attempt to classify them according as they affect what the law regards on the one hand as rights, and on the other as privileges. In the case of such actions of individual application as affect rights we may distinguish orders that something be done from decisions as to questions of fact or of law. In the case, however, of administrative action as to privileges, most, if not all, of the cases will fall under the head of decisions.

a. Administrative Decisions Affecting Private Rights. 1. *In Matters of Taxation.*—In matters of taxation, administrative action of individual application may, if we analyze administrative action generally, be said to be taken with the purpose of expressing in the concrete case the will of the state. Thus a statute may provide in a general way the taxes which all taxpayers of a certain defined class shall pay. This statute may furthermore be supplemented by administrative regulations such as the detailed and complex, if not incomprehensible, regulations with regard to the federal income tax. But no matter how detailed such statutes and regulations may be, it is impossible for any particular individual taxpayer to know what amount in dollars and cents of tax he will have to pay before a decision has been reached by the competent administrative authorities. Such a decision in almost all American tax laws is called an assessment or an appraisal.

The protection of private rights against the exercise of arbitrary administrative discretion is in tax, as in most other matters, dependent first upon the procedure which must be followed by tax-assessing and collecting authorities; and, second, upon the judicial remedies which are open to the taxpayer. The general rule of our constitutional law is that the due process of law clause requires that some time during the assessment or collection proceedings the taxpayer must have the right to be heard. If such an opportunity is accorded to him during the administrative assessment proceedings, compliance with the constitutional requirement has been had and there is no constitutional necessity to provide a judicial remedy, or even an administrative appeal.[6] In this case it is said by Mr. Justice Brewer: "A hearing before judgment with full opportunity to present all the evidence and the arguments which the party deems important is all that can be adjudged to be vital. Rehearings and new trials are not essential to due process of law, either in judicial or administrative proceedings. One hearing, if ample, before judgment satisfies the demand of the Constitution in this respect. What has been said is, of course, true only as to the valuation of a taxable object, such as property, income, franchise, or import. It would probably be unconstitutional, though this is not absolutely certain, for the legislative authority to cut off the judicial remedy with regard to legal questions involving liability to taxation. Certainly such action would be unconstitutional if the attempt were made to deprive the courts of the power to determine the constitutionality of the action of the legislature in tax matters.

The law, however, sometimes provides something in the nature of a judicial remedy in the case of mere assessments or appraisals. In some states, as in New

(6) Pittsburgh, C., C. & St. L. Ry. Co. v. Backus, 154 U. S. 421.

York, the writ of certiorari to review a determination has been made applicable to many tax assessment cases. In other states there is some form of statutory appeal to the courts from tax assessments. In general, however, it may be said that appeals to the courts with regard to the question of fact involved in assessment appraisal or valuation proceedings are not permitted.

The exercise of arbitrary administrative discretion in tax proceedings is perhaps carried the furthest in the law of the federal government. Here, as a result of statute as interpreted by the courts, practically every judicial remedy which elsewhere is open to the individual is cut off with the exception of an action for money had and received. brought after involuntary payment under protest against the tax collector.[7] And on such suits mere questions of valuation not involving questions of law affecting taxability may not usually be considered. Thus, the customs law has often specifically provided that the appraisal of imported goods for customs revenue purposes, when made by the competent administrative authorities, is final.[8]

The administrative decision fixing the value for purposes of taxation of a taxable object has in some cases also the characteristic of an order that something be done in the future, that is, that a certain sum of money be paid. Where this is not the case, this decision is made the basis of such an order. The amount to be paid is determined as the result of a simple mathematical calculation consisting in the multiplication of the ascertained assessment valuation by the tax rate. It is frequently the case that this order is executed by summary administrative process, and no suit in a court for the collection of the tax is provided in the law. Such summary administrative proceedings have been held by our court to be the due process of law required by the Constitution.[9]

Where no provision for even an administrative hearing has been made by the law, the courts have sometimes, even in the absence of statute to that effect, permitted the individual taxpayer prior to the collection of the tax to have an injunction to restrain its collection, or subsequent to its collection to have an action against the collector for money had and received. Due process of law would seem to make necessary the existence of some such remedy. The injunction, however, is only very cautiously used,[10] and is absolutely prohibited by Congress in the case of the taxes levied by the United States,[11] while the action for money had and received is subject to so many limitations that its effectiveness as a tax remedy is greatly curtailed.

Finally, all such judicial proceedings are customarily regarded as collateral rather than direct proceedings, so far as concerns an assessment made after a hearing. Where a hearing has been provided and the decision on such a hearing has not been attacked directly in the manner provided by law, the court will consider in these collateral proceedings only questions involving taxable jurisdiction.[12]

The result is that the individual is, by the American law of taxation, quite commonly subjected to the arbitrary discretion of the tax authorities so far as concerns questions of assessment valuation, and, because of the inadequacy of the judicial remedies available, finds it difficult, if not impossible in many cases, to secure a judicial review even of questions of law. This is particularly true of the smaller taxpayers, who, under the present methods of judicial proceedings, cannot afford the expense of an appeal to the courts against what they be-

(7) Cary v. Curtis, 3 How. U. S. 236; Cheesebrough v. United States, 192 U. S. 253; Wright v. Blakeslee, 101 U. S. 175.

(8) Passavant v. United States, 148 U. S. 214.

(9) McMillen v. Anderson, 95 U. S. 37; Palmer v. McMahon, 133 U. S. 660, affirming 102 N. Y. 176; Commonwealth v. Byrne, 20 Grattan, Va., 165.

(10) Dows v. City of Chicago, 11 Wall. 108.

(11) Snyder v. Marks, 109 U. S. 189.

(12) Palmer v. McMahon, 133 U. S. 660.

lieve to be the unauthorized and illegal decisions of tax officers.

2. *In Matters of Police.*—The gradual change in the United States from an agricultural to an industrial life, and the great increase of urban communities, have presented problems for the solution of which little if any provision was made in the common or statute law which we Americans received from England. English methods of dealing with what have been spoken of as "matters of police" were based on the law of nuisance. This law differentiated private from public nuisances, and apparently authorized anyone to abate a public nuisance, while only one specially injured might abate a private nuisance. It did not make effective provision for anything in the nature of a public authority whose duty it was to promote the public safety and convenience. Indeed, almost the only ways in which public authorities participated in nuisance abatements were, first, in the indictment and prosecution of public nuisances; and, second, in determining, in the case nuisances had been privately abated, what were the rights of the parties concerned. For individuals who attempted to exercise their legal rights in the abatement of private or public nuisances did so at the risk of having the courts hold that what had been abated was not a nuisance.

The whole English law on this subject is a good example of those methods of self-help which are characteristic of rather primitive social conditions and of an undeveloped legal system based on individualistic rather than social conceptions.

The English law, as we inherited it, was naturally unfitted for the complex relations of modern industrial and urban life. Soon after American social conditions began to change, attempts were made to change the law. The first attempts were made in the City of New York about the middle of the nineteenth century. The first point of attack was the method of abatement of nuisances by criminal proceedings. Such proceedings had shown themselves to be absolutely ineffective. The ordinary petit juries had been so regardful of private rights where the interests of the public were involved that the maintenance through existing methods of reasonably sanitary conditions was impossible. A law was, therefore, passed, providing for an administrative sanitary authority—the board of health—whose duty it should be to preserve the public health. To this body was given the power, after granting a hearing to individuals who might be affected by its orders, to declare specific conditions to be nuisances, and to abate them. The constitutionality of this method of action was bitterly contested in the courts, but was upheld, the courts taking the view that the administrative hearing provided was due process of law, and that one who had not taken advantage of the opportunity to be heard before the board of health provided by law could not, in a subsequent collateral proceeding, such as an injunction to restrain the board of health from enforcing its order, attack that order as invalid.[13] But for some reason or other the example set by New York has not been generally followed throughout the country, nor has the procedure thus provided for the abatement of nuisances been commonly applied even in the State of New York itself.

The methods commonly adopted in this country for the preservation of the public health are adaptations of the old, primitive English methods. They seldom provide for anything in the nature of a hearing before sanitary authorities as to the actual existence of the nuisance of which complaint may be made.[14] They are almost always based upon the idea of summary abatement, a sanitary officer possessing in theory only the powers possessed by private individuals under the early English law. There is thus little opportunity to distinguish between a decision as to the existence of a

(13) Metropolitan Board of Health v. Heister, 37 N. Y. 661 (1868).

(14) See People ex rel. Copcutt v. Board of Health, 140 N. Y. 1; North American Cold Storage Co. v. City of Chicago, 211 U. S. 306.

state of facts, *i. e.*, the presence of a nuisance, and an order that something be done, *i. e.*, that the nuisance be abated.

Often the law does not require even notice to the parties affected,[15] though such notice is frequently given as a matter of fact.

These very summary and arbitrary proceedings have, however, usually been accompanied by such extensive judicial remedies that the effectiveness of nuisance removal proceedings would have been seriously diminished had the courts not applied the remedies with considerable caution, and had the application to the courts for the exercise of their powers of review not involved an expense too great to be justified except in the most important cases.

The most noticeable points with regard to which the courts have insisted on their powers of review are two:

In the first place, they have held, as has been said, that neither the legislature nor any administrative authority to which the legislature has delegated power may declare that to be a nuisance which is not a nuisance.[16] This means, in plain English, however the courts may disguise and becloud the issue, that the legislative determination as to what conditions are nuisances is subject to judicial review. This rule of law is, however beneficent its operation may be and however wise the courts may have been in applying it, inconsistent with our general theory of legislative discretion. Its application, furthermore, has, in conditions such as have existed in New York City, been a serious hindrance to the progress of reasonable social reform. The decision of the New York Court of Appeals, for example, that the law prohibiting the manufacture of cigars in tenement houses was unconstitutional has very seriously hampered the administration of the public health law in that city, as well as made difficult, if not impossible, the regulation of sweated labor.

In the second place, the courts have claimed in the exercise of their powers of review the right to determine whether health and public safety authorities have acted within their jurisdiction, even where such jurisdiction has been dependent upon the existence of states of facts the existence of which can be determined only as the result of investigation by scientific experts. Thus, for example, a board of health may have the right under the law to kill all horses having glanders. They examine certain horses by their experts, and determine that these horses have glanders. The court, in a suit for trespass against the health officers, determines by a jury that the horses did not have glanders, and gives judgment against the health officers.[17] In one rather famous instance the case as reported would seem to show that the jury determined that the disease which brought about action by the health officers, that is, anthrax, did not exist, although those officers had, as a result of a bacteriological examination, reached a contrary conclusion.[18]

If the courts exercised with great freedom the powers which they thus claim, an effective health administration would be impossible. Fortunately, they do not do so. On the contrary, they are very apt to regard the action complained of, except in somewhat extraordinary and aggravated cases, as within the jurisdiction of the health or other authorities.[19] Once that is admitted, there is no remedy open to the individual. He is almost an outlaw. Alterations in his property involving great expense may be ordered, although he has never had an opportunity to be heard.[20] He may be deprived of his liberty on the supposition that he has a contagious disease

(15) Health Department v. Trinity Church, 145 N. Y. 32.

(16) Evansville v. Miller, 146 Ind. 613; Yates v. Milwaukee, 10 Wall. 497.

(17) Miller v. Horton, 152 Mass. 540.

(18) Lowe v. Conroy, 120 Wis. 151.

(19) Cf. Raymond v. Fish, 51 Conn .80; Salem v. Eastern R. R. Co., 98 Mass. 431.

(20) Health Dept. v. Trinity Church, 145 N. Y. 32.

which, as a matter of fact, he may not have. His children may be torn from his arms and placed in a pest house.[21] And in no case does he have anything in the nature of an effective remedy.

The courts usually justify their decisions as to the remediless position of the individual in these cases by calling attention to the necessity of haste, and the consequent impossibility of providing a hearing. The argument is valid with regard to cases of infectious disease, impure food, and a series of similar matters. It is not valid, however, in cases such as the reconstruction of buildings which, when erected, conformed to the law. But in such cases it is commonly the rule that no hearing is either provided by law or granted by police authorities. Cases are too common where orders are issued by health or other police authorities, compliance with which involves the expenditure of large amounts of money, where the house owner has never had the slightest opportunity to be heard and first learns of the proceedings through the service on him of the order. Instances, furthermore, are not uncommon where the order is accompanied with a list of firms who will be glad to compete for the contract necessitated by the doing of the work called for by the order.

Practically the only effective remedy which the individual has in these cases is an injunction to restrain the enforcement of the nuisance removal order. In these injunction proceedings a number of questions may be raised. In the first place, the constitutionality of the law under which action is being taken may be inquired into. In this respect the judicial control is, in my opinion, as I have indicated, too extensive, since as a result legislative discretion is subject to review. In the second place, where the action complained of is not clearly within the authority of an admittedly constitutional statute, its reasonableness may be questioned. This is, as it should be, if no other means of review is provided.

The appeal thus provided against the reasonableness of administrative action is not, however, nearly so effective as it appears to be at first blush.

Its ineffectiveness is due in part to the fact that courts do not care, for fear of a flood of litigation, to entertain any but the most aggravated cases. Furthermore, these cases come before them, to an extent at any rate, prejudged, although the complainant may not have had, and usually has not had, his day in court. He must, therefore, make out a very strong case in order to obtain relief. Finally, these cases are rather technical in character and outside of the ken of judges whose main work is the application of the rules of law governing the relations of private individuals, one with another.

I have said that the only practical remedy is the injunction. It is, of course, true that the individual deeming himself aggrieved in those cases has, theoretically at any rate, the right to sue the offending administrative officer for trespass after the order complained of has been enforced, and that where disobedience of an administrative order is punishable criminally, he may refuse to obey the order and, when prosecuted, put up his defense. In both these cases about the same questions may be raised as may be raised in the case of the injunction. As a matter of fact, however, the civil remedy in damages is of little practical use. Judgments against officers rarely have any great pecuniary value. As for the defense in criminal proceedings, while it may be desirable that it be available, it is not, any more than the action in damages, of great practical value. For few people like to take the risk of criminal proceedings.

Finally, in both the civil action in damages, and in criminal proceedings, the attitude of the court, certainly so far as the legal questions raised are concerned, is about the same as in the case of injunc-

(21) Hoverty v. Bass, 66 Me. 71.

tions. The case comes to the court prejudiced. The only amelioration of the lot of the individual is to be found in the attitude of the jury, which is apt, as has been said, to consider private rights rather than social interest.

3. *Administrative Decisions Affecting Privileges.*—So far we have confined our consideration to cases where private rights have been involved. There is, however, a large number of very important cases where privileges, as the law regards them, rather than rights, are in question.

Most of the cases involving privileges, the exercise of which is dependent upon administrative decisions, have probably arisen under the federal government. There is, however, one rather large class of cases which are regulated by state law. These cases have to do for the most part with licenses which permit the individual to do what would be illegal did he not possess such a license.

In general, there are two lines of decisions in the states with regard to this matter. One holds that the legislature may not constitutionally provide that the grant of a license to do a thing which, without such a license, would be illegal, shall rest in the arbitrary discretion of an administrative authority. These decisions hold that the legislature must lay down in advance the conditions which must be present in order that a license may or may not be issued, and declare unconstitutional license laws which do not contain such conditions.

The other line of decisions takes the contrary view and regards as proper laws which place the licensing power in the discretion of administrative authorities. The decisions of the United States Supreme Court adhere to this view.[22] They hold that the due process of law required by the Fourteenth Amendment is present where administrative authorities have complete discretion in license matters.

The protection accorded the individual by the first line of decisions is not, however, nearly so great as it would at first appear to be. For there has not as yet been developed in our law an effective remedy against the use of discretionary power by administrative officers through the exercise of their power to render mere decisions. It is, of course, true that under the first line of decisions no person can be criminally punished for acting without a license where a statute which requires a license attempts to give complete discretion to licensing authorities. That is, he may transact the business without a license and, when prosecuted, set up as a defense the unconstitutionality of the law requiring it. But it is to be remembered that where administrative discretion in the issue of licenses is in theory limited, there is seldom an effective remedy where the license is refused, because of the decision of the licensing authority that the conditions necessary for the grant of the license are not present. Thus, take the case of liquor licenses which are to be granted only to persons of good moral character, or on the application of a certain number of reputable persons. The refusal of the issuing authority to grant the license because of the character of the applicant or his sponsors is seldom if ever reviewable by the courts.[23] Take, again, the case of the grant of a license to practice medicine or dentistry to every graduate of a reputable medical or dental college. The refusal to grant the license to a person on the ground that he is not the graduate of a reputable institution may not usually be judicially reviewed.[24] Indeed, it may be said that almost the only cases in which the state courts will review the determinations of licensing authorities are where those determinations are clearly opposed to the admitted facts, or have without question been made as the result of the abuse of discretion. Such cases as have been decided, furthermore, have come up commonly on de-

(22) Wilson v. Eureka City, 173 U. S. 32.

(23) See Devin v. Belt, 70 Md. 352; United States ex rel. Roop v. Douglas, 19 D. C. 99.

(24) People ex rel. Sheppard v. State Board, etc., 110 Ill. 180.

murrer which has admitted the alleged abuse of discretion.[25]

The courts have exhibited this reluctance to exercise a control over the discretion of licensing authorities in the issue of licenses, although it is seldom the case that licensing laws provide for anything in the nature of a formal hearing for the applicant for a license.

In the case, however, of the revocation of a license other than a liquor license, the courts usually insist that the person whose license is to be revoked must have a formal hearing.[26] There is a case in the New York courts, however, which holds that a license to sell milk could be revoked without notice or a hearing.[27] But the facts showed that the person whose license had been revoked had been several times convicted for selling impure milk. The court, therefore, refused him a peremptory mandamus to compel the licensing authority to rescind its action in revoking the license.

I have said that the most important cases with regard to privileges have come up in connection with legislative acts of the federal government.

These cases have had to do with the immigration of aliens, the importation of forbidden products, the public lands, military pensions, and the use of the mails. The United States Supreme Court has in its decisions recognized a very large power of uncontrolled discretion in administrative officers. It has thus accorded to administrative officers the right finally to determine whether an alien immigrant may lawfully enter the United States,[28] whether imported teas come up to the required standard,[29] whether a person of Chinese race was born in the United States and is, therefore, a citizen,[30] whether a person is making unlawful use of the mails,[31] and whether clearance papers shall be issued to a vessel sailing from a United States port where it is alleged that the officers of such vessel have violated a law of the United States and refused on demand to pay the fine appended by law to such violation.[32]

Almost the only instances in which the Supreme Court has not regarded as final the action of administrative officers acting in these cases are where they have exceeded their jurisdiction, *e. g.*, by attempting to exclude as an alien one who was not an alien,[33] or by denying to a person the use of the mails for a reason not provided for in the law.[34] In some of the cases the court has recognized the finality of the administrative determination as to mixed questions of law and fact as well as to mere questions of fact.[35]

The result of our investigation would seem to be, then, that although under the American law individuals may be more than amply protected in their rights against unconstitutional legislative action, they are very largely left to the tender mercies of administrative discretion in the case not only of their privileges, but as well of the rights recognized as theirs by the constitutional bills of rights. American law has not as yet devised effective remedies against administrative discretion. Nor has it provided a system of administrative procedure in these matters which assures to the individual a hearing before orders are issued, compliance with which involves the incurring of great expense.

The unfortunate position in which the individual is placed over against adminis-

(25) See Illinois Board, etc., v. People ex rel. Cooper, 123 Ill. 227.

(26) City of Lowell v. Archambault, 189 Mass. 70.

(27) Metropolitan Milk and Cream Co. v. City of New York, 113 App. Div. 377.

(28) Nishimura Ekin v. United States, 142 U. S. 651.

(29) Buttfield v. Stranahan, 192 U. S. 470.

(30) United States v. Ju Toy, 198 U. S. 253.

(31) Bates & Guild Co. v. Payne, 99 U. S. 106; Public Clearing House v. Coyne, 194 U. S. 497.

(32) Oceanic Steamship Co. v. Stranahan, 214 U. S. 320.

(33) Gonzalez v. Williams, 192 U. S. 1.

(34) Magnetic School of Healing v. McAnnulty, 187 U. S. 94.

(35) Public Clearing House v. Coyne, 194 U. S. 497.

trative authorities is a continual source of corruption. Where he has no right to a hearing and no effective judicial remedy, it is almost certain that there will be many cases in which the inspectors upon whose report orders to be summarily executed are issued will be paid to report conditions not as they are, or will extort blackmail from the individual before they will report those conditions as they are. The danger is all the greater in this country because of the incapacity and lack of character of many of the employes in the civil service of our cities, where the conditions are such as to demand more than elsewhere administrative regulation and control.

The unfortunate position in which our people are thus placed is one in which they should not be placed. It is due to the primitive character of our legal system. In both England and on the Continent the change in social conditions which has taken place in the last century has resulted in the adoption of proper administrative procedure and of adequate judicial remedies. A study of the recent development of the administrative law of Europe would reveal the fact that we have much to learn as to the protection of private rights from countries like France and Germany, which we are accustomed to consider as not particularly solicitous for individual liberty. The law of these countries has not, it is true, subjected in any large measure legislative discretion to judicial control. It has, however, given to the individual a protection against the arbitrary exercise of administrative discretion for which we look to our law in vain.

What has been said is particularly true of the French law, which has, through the recent decisions of the Council of State—the highest of the special administrative courts—the peculiar contribution of France to the science of administrative law—a remedy against administrative action which surpasses in effectiveness any remedy which can be found in other legal systems.

It is greatly to be regretted that in our system of legal education there would appear to be at the present time no place for the serious study and investigation of these and similar legal problems. What seems to be needed is that somewhere in the United States, preferably in connection with some one of our universities, there should be established a school or department not for the education of lawyers for the practice of the law, but for the study of jurisprudence, in which greater attention might be given than is now possible to the solution of the many legal and political problems which the great changes in our economic and social life are with increasing emphasis bringing to our attention.

FRANK J. GOODNOW.

Baltimore, Md.

ACTION—JOINDER OF PARTIES.

ROYER v. RASMUSSEN, et al.

Supreme Court of North Dakota. June 15, 1916.

158 N. W. 988.

(*Syllabus by the Court.*)

A master and his servant may be jointly sued for the negligence of the latter, when the former is liable for such negligent act.

FISK, C. J. The complaint in effect alleges that plaintiff, while crossing one of the streets in the city of Grand Forks, was run over and injured by an automobile owned by defendant M. Rasmussen while being driven by his servant and co-defendant, Minnie Rasmussen; that the accident was caused by the careless and negligent manner in which such automobile was being driven.

Each of the defendants separately demurred to the complaint, which demurrer was overruled, and each have appealed. It is stipulated that the decision of one appeal will control the other. It is conceded that the sole question for decision is whether the causes of

action against the defendants are properly joined. Appellants contend that there is an improper joinder of causes of action for the reason that the liability of the servant, if any, is based upon her personal negligence, while that of the master is predicated upon the theory that the negligence of the servant is imputed to him. In other words, it is asserted that he can be held only upon the doctrine of respondeat superior, for the alleged reason that he was not present in the car at the time of the accident. Such contention, however, has no proper basis in the record, for the complaint in paragraph 1 thereof distinctly alleges:

"That * * * the auto * * * was operated by * * * Minnie Rasmussen at all the times mentioned * * * for and on the business of the defendant M. Rasmussen and with his knowledge, consent, and under his direction."

Such allegations for the purposes of this appeal must be accepted as true. It follows therefore that the defendants are jointly guilty of the acts of negligence complained of, and, this being true, they can be proceeded against jointly under all the authorities. This alone would necessitate an affirmance of the orders, but we wish to place our decision on the broader ground that even if the complaint had disclosed that the master was not present at the time of the accident and the automobile was not being driven under his direction, still both were properly joined in one action notwithstanding the fact that some courts of high standing have held to the contrary. We are firmly convinced that their reasoning is both technical and unsound even at common law, and, moreover, they are clearly out of harmony with our reformed system of pleading and are opposed to the great weight of modern authority. We deem it unnecessary to enter into a minute discussion of the question at this time for the reason that this court has recently had occasion to pass upon substantially the same principles of procedure which are here involved. See Stark County v. Mischel, 156 N. W. 931, and Allen v. Cruden, 157 N. W. 974. The Supreme Court of our sister State of Minnesota in Mayberry v. Northern Pac. Ry. Co., 100 Minn. 79, 110 N. W. 356, 12 L. R. A. (N. S.) 675, 10 Ann. Cas. 754, recently decided the identical question before us under a statute very similar to our section 7466, Compiled Laws 1913, and we hereby adopt the reasoning and conclusion of that court as the sound and sensible rule for this jurisdiction.

Judgment affirmed.

NOTE.—*Joinder of Master and Servant as Defendants in Suit for Tort.*—Whatever may be thought of the contention that in a case where a master and servant are joined as defendants for a wrong done by the servant, where the master does not participate in the negligent or wrongful act of the servant, on technical grounds it is not maintainable, at least it has been ruled, that in removal cases this joinder present a non-separable controversy. Alt. G. S. R. Co. v. Thompson, 200 U. S. 206, 26 Sup. Ct. 161, 50 L. ed. 441, 4 Ann. Cas. 1147. This ruling proceeds on the theory that improper joinder merely goes to the success or failure of plaintiff in a suit and not to removability of the suit. Only fraudulent joinder operates to show there is no joint cause of action.

In the decision above cited, reference was made to Warax v. C. N. O. & T. P. R. Co., 72 Fed. 637, where it was held that a joint action could not be sustained against master and servant for acts done without the master's concurrence or direction, and his responsibility was based on his liability under the doctrine of *respondeat superior.* This case was not overruled but it was merely said this presented no test of removability. At page 643, the opinion by the Circuit Court said: "It will thus be seen that the master is not held on any theory that he personally interferes to cause the injury. It is simply on the ground of public policy, which requires that he shall be held responsible for the acts of those whom he employs, done in and about his business, even though such acts are directly in conflict with the orders he has given on the subject. The liability of the servant, on the other hand, arises wholly because of his personal act in doing the wrong. It does not grow out of the relation of master and servant, and does not exist at all unless it would also exist for the same act when committed, not as the servant but as the principal. Liabilities created on two such wholly different grounds are not and ought not to be joint."

In W. U. Tel. Co. v. Olsson, 40 Colo. 264, 90 Pac. 841, this reasoning was expressly approved in a case where a non-resident corporation and its servant were joined as defendants and verdict against both was set aside.

In Mulchey v. Society, 125 Mass. 487, it was said that: "The jury should have been instructed as requested by defendants, that this action could not be sustained against both the Society and its agents. "If there was any negligence in the agents for which they could be held liable, their principal would be held responsible, not as if the negligence had been its own, but because the law made it answerable for the acts of its agents. Such negligence would be, neither in fact nor in legal intendment, a joint act of the principal and of the agents, and therefore both could not be jointly sued."

In Ohio this theory seems to have support in decision. Seelen v. Ryan, 2 Cin. Sup. Ct. Rep. 158; Clark v. Fry, 8 Ohio St. 358, 72 Am. Dec. 590. But if the servant's act amounts to misfeasance they are joint tortfeasors. Henshaw v. Noble, 7 Ohio St. 226. See also McGinnis v.

C. R. I. & P. R. Co., 200 Mo. 347, 98 S. W. 590, 9 L. R. A. (N. S.) 880; So. R. Co. v. Grizzle, 124 Ga. 735, 53 S. E. 244, 110 Am. St. Rep. 191. And if there is willful tort by the servant, acting within the scope of his agency. Schumpert v. So. R. Co., 65 S. C. 332, 43 S. E. 813, 95 Am. St. Rep. 802; Davenport v. So. R. Co., 135 Fed. 960, 68 C. C. A. 444.

If the negligence of the master and servant combine to produce an injury, a joint action lies against them. Fuller v. Tremont Lumber Co., 114 La. 266, 38 So. 164, 108 Am. St. Rep. 348.

The rule laid down in Clark v. Fry, *supra*, is reaffirmed in French v. Central Construction Co., 76 Ohio St. 509, 81 N. E. 751, 12 L. R. A. (N. S.) 669, where the opinion after reciting the facts stated: "Upon these facts and under such circumstances, the construction company, if liable at all, is liable not as a joint tortfeasor, but under the doctrine of *respondeat superior*. * * * While the general rule, perhaps, is that master and servant are each severally liable for the wrongful and tortious act of the latter, committed in the course of the master's business, it does not therefore follow, that they are, or may be held jointly responsible for the consequences of such act, or that a joint action can be maintained against them therefor by a person thereby injured." There are cited in support, Parsons v. Winchell, 5 Cush. 592, 52 Am. Dec. 745; Campbell v. Portland Sugar Co., 62 Me. 552, 16 Am. Rep. 503; Page v. Parker, 40 N. H. 47; Bailey v. Bussing, 37 Conn. 349, and cases hereinbefore noticed.

There are a great many cases opposed to this ruling and Labatt on Master and Servant, § 2512, says the preponderance of authority is thus, the better view in his opinion being that joinder should be allowed on the theory that thereby there is done away with a multiplicity of suits. "The judgment in an action where the master does not participate in the wrong may be considered as joint and several, so as to preserve the master's right to an action against the servant in reimbursement, and this would appear to be especially true under the modern forms of procedure abolishing the distinctions between the ancient technical forms of pleading." C.

BOOKS RECEIVED.

Corpus Juris. Being a Complete and Systematic Statement of the Whole Body of the Law as Embodied in and Developed by all Reported Decisions. Edited by William Mack, LL.D., Editor-in-Chief of the Cyclopedia of Law and Procedure, and William Benjamin Hale, LL.B., Contributing Editor of the American and English Encyclopedia of Law and the Encyclopedia of Pleading and Practice. Volume VII. New York. The American Law Book Company. 1916. Review will follow.

HUMOR OF THE LAW.

A lawyer wanted an apprentice and placed an advertisement in the local paper. A number of boys replied, so he gathered them all together in his office at once and looked them over. He found it pretty hard to make a choice, but at length a happy idea struck him.

"Once upon a time," he said, "a farmer was very much annoyed by a huge rat that made a very comfortable living by feeding upon his grain and other products. He tried traps of all kinds to catch it, but the wily rodent evaded them all and apparently enjoyed the game of hide and seek that the farmer had devised for its recreation. One day, however, as the farmer turned the corner of a haystack, carrying a gun in his hand, he spied the troublesome rodent at the edge of the hay. Instantly raising his gun, he fired, but the blazing gun-wad dropped among the hay"—

Here the lawyer stopped, and, looking at the boys, he said, "If any of you want to ask a question, write it on a piece of paper." Each did as suggested, and here are some of the questions that were asked:

"Did he set the hay on fire?"

"Was the stack burned to the ground?"

"Did the farmer have his hay insured?"

"Was the fire engine near at hand?"

"Was the rat killed?"

The boy that asked the last question was chosen because he stuck to the point.—*American Photography.*

"The street crossings at Hickory street, St. Louis avenue, Mulberry, and Santa Fe streets were blocked for twenty-five minutes by a train," says the Kansas City Star. "A. L. Anderson, the conductor, was in police court to tell why.

" 'You see, it was this way,' he said. 'We were pulling into Armourdale when the train stopped suddenly. I ran to find what was wrong. Well, the engine was around one curve, the caboose around another, and I couldn't get a signal to either man. The tower-man was handing me the back-up and somebody else was giving me the go-ahead. Just then I found an angle cock had dropped from the air tube on one of the cars, and they were trying to line up the switches on me. Then I got a stop word and I found out a pin lifter had dropped. I slacked 'em ahead as soon as I could, but I couldn't help matters.' "

" 'I guess so,' said Judge Kyle. 'Ten dollars.' "—The Docket.

WEEKLY DIGEST

Weekly Digest of ALL the Important Opinions of ALL the State and Territorial Courts of Last Resort and of ALL the Federal Courts.

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1. **Arrest**—Justification.—Without a warrant in his actual possession an officer cannot lawfully make an arrest for a misdemeanor not committed in his presence.—State v. Shaw, S. C., 89 S. E. 322.

2. **Assault and Battery**—Defenses. — The plaintiff in an assault and battery case cannot show that defendant was a quarrelsome man.—Russ v. Good, Vt., 97 Atl. 987.

3. **Attorney and Client**—Disbarment. — The legislature cannot deprive courts of their inherent right to disbar or suspend an attorney for malfeasance or misfeasance in office.—State v. Reynolds, N. M., 158 Pac. 413.

4.——Settlement by Client.—An attorney for a judgment creditor is not liable for the wrongful act of his client in accepting payment in settlement of a judgment lien after having assigned such lien.—Abramson v. Ryall, N. Y., 159 N. Y. Supp. 772.

5.——Waiver.—Defendant's objection that attorney making motion for award of alimony was never formally substituted as plaintiff's attorney was waived by defendant's appearance on a motion by such attorney for plaintiff for permanent alimony, since the entry of the interlocutory judgment and his successful resistance of such motion.—Doerle v. Doerle, N. Y., 159 N. Y. Supp. 637.

6. **Bankruptcy**—Discharge.—Where a bankrupt made no showing to explain a large loss within a period of ten months, which resulted in bankruptcy, and it appeared during that time the bankrupt had interested new capital, his discharge will be denied, on the ground of concealment of assets.—In re Loeb, U. S. C. C. A., 232 Fed. 601.

7.——False Pretenses.—Act of judgment debtor in proceedings supplementary to execution in obtaining surety company to become surety upon his bond to executors, to obtain from them moneys claimed by judgment debtor, was not obtaining property from surety company, within Bankr. Act, § 17, providing discharge releases from all provable debts, except liabilities for obtaining property by false pretenses.—In re Dunfee, N. Y., 159 N. Y. Supp. 703.

8.——Special Deposit.—A customer, on bankruptcy of his broker indebted to him, is entitled to receive back a stock certificate deposited with the broker for margin security.—Boston Safe Deposit & Trust Co. v. Adams, Mass., 113 N. E. 277.

9.——Surety.—Where after one claiming property taken under attachment against a third person was adjudged a bankrupt, such adjudication did not free the claimant and his sureties from liability on a bond given to obtain possession of the property.—Sanderson v. Buckley, Miss., 72 So. 148.

10. **Banks and Banking**—Constructive Notice.—Mere use of word "trustee" in an account with a trust company did not give it even constructive notice that account was really a trust, and not an individual, account.—Fidelity & Deposit Co. of Maryland v. Queens County Trust Co., N. Y., 159 N. Y. Supp. 954.

11.——Police Power.—A special act chartering a bank to do business under such rules as the stockholders may adopt, provided they be not in violation of the state and federal constitutions, is not a waiver of the state's police power, and banking act of 1914, providing for inspection of such institutions, applies.—Bank of Oxford v. Love, Miss., 72 So. 133.

12. **Bills and Notes**—Attorney Fees.—Where secured notes provided for costs of collection and 10 per cent attorney's fees, and a complaint thereon demanded 10 per cent, and defendants contested 10 per cent, and required proof of ownership, necessary on default, 5 per cent attorney's fees held sufficient.—Smith v. Phifer, S. C., 89 S. E. 323.

13.——Consideration.—In action on notes to secure price of cattle to be bought under an understanding that proceeds of sales thereof were to be credited on the note, where the cattle were never purchasd, verdict was properly directed for one defendant, as to whom no other consideration than advancements for the cattle was shown.—A. L. Suttles & Co. v. Adams, Ga., 89 S. E. 329.

14.——Indorsement.—One who signs or indorses note to accommodate another, and has note discounted and proceeds credited to the party accommodated, cannot defeat suit on note on the ground that he did not receive consideration.—First State Bank v. Davis, La., 72 So. 185.

15.——Innocent Holder.—As against a bona fide holder for value of notes, defenses amounting to want of consideration or breach of agreement, upon which the notes were given, are not available.—Parry & Jones v. Empire Granite & Quarry Co., Vt., 97 Atl. 985.

16. **Brokers**—Ratification.—Where landowner, while absolutely repudiating to a real estate agent the latter's agreement to sell on certain terms, incidentally stated that terms and price were all right, but another party was to have the place, there was no ratification.—Woods v. Wilson, Ia., 158 N W, 495.

17. **Carriers of Goods**—Federal Law.—While federal legislation upon liability of carriers in interstate commerce supersedes state regulations and policies, it did not destroy but was intended to continue in force any right which shipper had under common law, not inconsistent with federal, and the common-law rule, making carrier liable for any loss or damage not the act of God or the public enemy, was not affected.—Bowles v. Quincy, O. & K. C. R. Co., Mo., 187 S. W. 131.

18.——Foreign Transportation.—The Carmack Amendment to Interstate Commerce Act, § 20, does not make a domestic carrier liable for loss occasioned by the negligence of a foreign carrier or for transportation to foreign countries, but only as to commerce between the states and territories within the United States.—Aldrich v. Atlantic Coast Line R. Co., S. C., 89 S. E. 315.

19. **Carriers of Live Stock**—Notice of Claim.—Failure to give notice of damages to interstate shipment of live stock, as required by a reasonable and valid provision of the shipment contract, held to preclude recovery of damages.—Kansas City, M. & O. Ry. Co. of Texas v. Gleason, Okla., 158 Pac. 365.

20.——Notice of Claim.—A provision in the shipping contract under which live stock was transported requiring written notice of claim for damages within ten days from removal of stock from car is unenforceable, where it did not appear to be supported by any consideration. —Bernstein v. Yazoo & M. V. R. Co., Miss., 72 So. 132.

21. **Carriers of Passengers**—Negligence. — Provision of shipping contract that shipper agrees to ride in caboose while train is in motion, does not affect case where shipper when injured was in car containing shipment, while train was not in motion.—Gerin v. Chicago, M. & St. P. Ry. Co., Minn., 158 N. W. 630.

22. **Commerce** — Interstate Transaction. — Where shipment of hogs was consigned from one point in Missouri to another, but route of connecting carrier went into State of Kansas passing through several towns therein, at which hogs were unloaded and fed, it was an interstate shipment.—Bowles v. Quincy, O. & K. C. R. Co., Mo., 187 S. W. 131.

23. **Compromise and Settlement**—Fraud.—A settlement between contractor and subcontractors reciting that parties had no dispute as between themselves relating to wet excavations, but desire to prosecute claim against railroad, bars cause of action against the contractor for such work unless procured by fraud or without consideration.—Griffith v. Dowd, Minn., 158 N. W. 420.

24. **Constitutional Law**—Unlawful Discrimination.—Accused is entitled to judicial determination whether members of his race legally qualified to serve as jurors have been unlawfully discriminated against so as to deny him equal protection of laws guaranteed by Const. § 1, and U. S. Const. Amend. 14, § 1.—Haynes v. State, Fla., 72 So. 180.

25. **Contracts**—Grammatical Errors. — The maxim, "Mala grammatica non vitiat chartam," is applied when the instrument was prepared by one unskilled in language and when grammatical construction is at variance with the intent, as indicated by the whole instrument, but, if it is the work of an educated, intelligent draftsman, grammatical construction and arrangement will be considered.—Bank of Union v. Redwine, N. C., 88 S. E. 878.

26.——Guaranty.—Testimony, that defendant guaranteed well long enough to prove that it would stay good, did not warrant charge as to liability, if defendants represented that water would be continuous, and that they would keep the well in good condition.—Ward & Tinsley v. Jennings, Ga., 89 S. E. 350.

27.——Restraint of Trade.—Where plaintiff contracted to sell defendant large quantities of drugs on credit, and defendant agreed to sell no other such goods, and to sell at fixed prices, within certain territory, the contract providing for release on payment of amounts due, it was not illegal as in restraint of trade.—W. T. Rawleigh Medical Co. v. Osborne, Ia., 158 N. W. 566.

28. **Covenants**—Building Restrictions.—Under restrictive covenant not to build within a certain distance of the "front line" of the premises, in case of a lot 60 feet on one street and 120 on another, the "front line" is that on both streets, at least where the building line is uniformly observed on the side street.—Beach v. Jenkins, N. Y., 159 N. Y. Supp. 652.

29. **Death**—Presumption. — Where the evidence affirmatively showed all the circumstances of the accident, there was no room for the application of the presumption that decedent was in the exercise of due care.—Bernstein v. Pennsylvania R. Co., Pa., 97 Atl. 933.

30. **Divorce**—Alimony.—Where a wife asks alimony in a divorce action, and none is awarded, the effect is the same as if the decree had expressly denied it, and is an adjudication binding on the parties.—Spain v. Spain, Ia., 158 N. W. 529.

31. **Ejectment**—Defenses.—In ejectment by a religious corporation to recover realty belonging to it, it is no defense that plaintiff seeks the property for purposes not authorized by its charter.—Greek Catholic Church of St. Michael the Archangel v. Schkodowsky, Pa., 97 Atl. 932.

32. **Eminent Domain**—Railroad.—Where city, in carrying out agreement with railroad for elevation of tracks, condemned private property, owner was not entitled to recover from city for injury from construction or operation of railroad, or for loss of siding at grade, but must look to railroad for such items.—Philadelphia Hardware & Malleable Iron Works v. City of Philadelphia, Pa., 97 Atl. 938.

33. **Estoppel**—Reliance. — Where landowner, after learning his agents had contracted to sell to a party other than him whom he desired, went to them and repudiated the transaction, but what he said did not influence the purchaser's course, landowner was not estopped by terms of his repudiation.—Woods v. Wilson, Ia., 158 N. W. 495.

34. **Explosives**—Negligence—It is actionable negligence to leave bombs or other explosives in a position where they are liable to become exploded by children to their injury.—Sroka v. Halliday, R. I., 97 Atl. 965.

35.——Negligence.—In action for injuries caused by explosion of can of lime packed and sold but not manufactured by defendant, it is necessary to aver and prove negligence.—Kusick v. Thorndike & Hix, Mass., 112 N. E. 1025.

36.——Ordinary Care.—Where a contractor is blasting in city street grading, he is bound to use every reasonable effort for the prevention of injury.—Briglio v. Holt & Jeffery, Wash., 158 Pac. 347.

37. **Factors**—Ratification. — Factor's unauthorized sale of goods confers no title on an innocent purchaser for value, unless the principal ratifies the sale or has clothed the factor with an appearance of ownership beyond that involved in an ordinary contract of consignment. —Abel Bros. & Co. v. Chase, Conn., 97 Atl. 762.

38. **False Imprisonment**—Evidence.—The unauthorized arrest of plaintiff by defendant for violating a void village ordinance regulating the speed of motor vehicles could not be justified by showing plaintiff's guilt of some other crime. —Chapman v. Selover, N. Y., 159 N. Y. Supp. 632.

39. **Fraudulent Conveyances** — Delivery. — Under Mills' Ann. St. 1912, § 3067, requiring change of possession on sale, where company sold its automobile, kept in public garage, and thereafter purchaser paid storage, car being nevertheless used by the company and bearing its old license number, car was subject to levy under execution issued against the company.—Goad v. Corrington, Colo., 158 Pac. 284.

40. **Guaranty**—Indemnity.—A guaranty of a note is a covenant to pay it, breached by failure of the note's maker to do so; while an indemnitor's covenant is merely to make good any loss from nonpayment.—Eckhart v. Heier, S. D., 158 N. W. 403.

41. **Highways**—Contributory Negligence. — A driver of a vehicle who suddenly slows up or stops, knowing that another is so close behind that such action will probably cause injury, and is, in fact, so injured, is guilty of contributory negligence.—Strever v. Woodard, Ia., 158 N. W. 504.

42. **Husband and Wife**—Alienation of Affections.—To recover for the alienation of his wife's affections, it is not necessary for plaintiff to show that defendant's acts were the sole cause.—Linden v. McClintock, Mo., 187 S. W. 82.

43.——Cancellation of Deed.—Where wife and daughter executed deed to one who used money to pay debts of husband and father, this did not give wife right to cancel deed, unless grantee was party to scheme to get wife to sell land to pay her husband's debts, in which event she could recover to extent of her interest.—Hickman v. Cornwell, Ga., 89 S. E. 330.

44. **Innkeepers**—Boarders.—"Board" is defined as "to receive food as a lodger or without lodging for a reasonable compensation;" "boarder" is one who has food or diet and lodging in another's family for reward or for a stipulated price; and a "guest" is a transient person who resorts to, and is received at, an inn for the purpose of obtaining accommodation which it purports to afford.—In re Doubleday, N. Y., 159 N. Y. Supp. 947.

45. **Insurance**—Contribution. — In insurance law, the term "contribution" has a fixed legal meaning. It is a principle sanctioned in equity, and arises between coinsurers only, permitting one who has paid the whole loss to obtain contribution from other insurers, who are also liable therefor.—National Fire Ins. Co. v. Dennison, Ohio, 113 N. E. 260.

46.——Disability.—An insurance policy's limitation of liability as to "disability, due to either accident or illness, resulting wholly or in part directly or indirectly, from * * * paralysis," applies where a disability results from paralysis, but not where an accident results in paralysis.—Foster v. North American Accident Ins. Co., Ia., 158 N. W. 401.

47.——Own Safe Clause.—Insured held not to have substantially complied with fire policy requiring books to be kept in iron safe or place of safety where he merely kept an inventory in a place of safety and loose sheets showing partial receipts of business.—Cohen v. Home Ins. Co., Del., 97 Atl. 1014.

48.——Presumption of Death.—By-law of fraternal beneficiary society declaring that member's disappearance should not be any evidence of his death, contravened Rev. St. 1911, art. 5707, relating to the presumption of death, and was invalid.—Sovereign Camp of Woodmen of the World v. Robinson, Tex., 187 S. W. 215.

49.——Unearned Premium.—Failure of insurer after a fire to return premium, or the unearned portion thereof, in accordance with provisions of policy providing for return in case policy should become void, is evidence of waiver of forfeiture.—Spence v. Phoenix Assur. Co., Ltd., of London, S. C., 89 S. E. 319.

50. **Intoxicating Liquors**—Burden of Proof.—Where the evidence shows receipt of money, with a request to procure whisky, and shortly thereafter delivery of whisky by the defendant to the person making request, the burden was on defendant to explain his procurement of the whisky.—Scott v. State, Ga., 89 S. E. 349.

51. **Joint Adventures**—Foreclosure. — Where investment company agreed to sell lots at certain price, and loaned money to other parties to agreement for joint venture in building house for sale, and such other parties failed to purchase the lots or make any sale of the house and lots, the investment company was entitled to sell, as in foreclosure, to obtain its advances. —Northwestern Transfer Co. v. Investment Co., Ore., 158 Pac. 281.

52. **Landlord and Tenant**—Abandonment. — Where landlord covenants to place building in condition for conducting a certain business and fails to do so, lessee is justified in abandoning leased premises and is not thereafter liable for rent.—Nelson v. Eichoff, Okla., 158 Pac. 370.

53.——Fraud.—Where lessor of farm suggested shortage of acre or acre and a half, without knowledge that shortage was any more, there was no fraud perpetrated, in inducing lessee to lease, giving him defense in lessor's suit on notes for rent.—Slump v. Blain, Ia., 158 N. W. 491.

54.——Repairs.—A loose, unstable plank-step provided by lessor at door of basement, of which lessor retained control, it is not such part of structure as to relieve lessor of duty of making changes to keep premises reasonably safe.—McNab v. Wallin, Minn., 158 N. W. 623.

55. **Libel and Slander**—Libel per se.—Publication of false statement that mayor's employe moved house of mayor in violation of ordinance, and that mayor was convicted of violating speed limit of another town, written in humorous vein, tends to provoke wrath and expose to ridicule, and is libelous per se.—Jones v. Register & Leader Co., Ia., 158 N. W. 571.

56. **Licenses**—Automobiles. — Motor Vehicle Law, § 289, subd. 4, requiring chauffeurs to be duly licensed, and § 281, defining a "chauffeur" as any person operating a motor vehicle as an employe or for hire, held not to require drivers neither for hire nor as employes to be licensed. —People ex rel. McCaul v. Loughrey, N. Y., 159 N. Y. Supp. 990.

57. **Livery Stable and Garage Keepers**—Conversion.—Where defendant automobile garage owners refused to accept $550 in payment of repair bill of $992, but offered to accept $792, the fact that thereafter defendant recovered judgment on such bill for $665 did not render them guilty of conversion for refusing to surrender the car until satisfaction of their claim.—Macumber v. Detroit Cadillac Motor Car Co., N. Y., 159 N. Y. Supp. 890.

58. **Master and Servant**—Inspection.—Telephone company is bound to inspect poles and lines and maintain them in a safe condition as to the public and employes.—Arnold v. Northeastern Pennsylvania Telephone Co., Pa., 97 Atl. 1038.

59.——Warning.—If a servant did not know of rule of his employers warning employes not to ride on freight elevator, he could not be bound by it.—Pascoe v. Nelson, Mont., 158 Pac. 317.

60.——Workmen's Compensation Act.—Where a contract of hiring was made in New York and the work performed and the servant injured there, though the master was a corporation licensed to do business in New Jersey, and the servant was a resident of New Jersey, his recovery in New Jersey was not governed by the Workmen's Compensation Act.—Hamm v. Rockwood Sprinkler Co., N. J., 97 Atl. 730.

61.——Workmen's Compensation Act.—Under Workmen's Compensation Act, whatever physical condition may exist in workman predisposing to injury, if employment is immediate occasion of injury, it arises out of employment, the employe being entitled to recover for all consequences.—Hartz v. Hartford Faience Co., Conn., 97 Atl. 1020.

62.——Workmen's Compensation Act.—Death of motorman from injuries received from automobile running near curb as he was hurrying from car barn to catch car of company to take him to have watch tested, a requirement of his employment, did not result from accidental injury arising out of course of employment within Workmen's Compensation Law, § 10.—DeVoe v. New York State Rys., N. Y., 113 N. E. 256, 218 N. Y. 318.

63.—Workmen's Compensation Act. — The weekly payment provided by the Workmen's Compensation Act for the dependent of an employe killed in service comes to an end when the dependent dies, and is not a vested right, passing to a legatee by will, or, in case of intestacy, going to dependent's next of kin.—In re Murphy, Mass., 113 N. E. 283.

64.——Workmen's Compensation Act.—Hemorrhage, due to natural causes, and not produced by fall of employe from his employer's wagon, which he was driving in course of employment, was not an injury arising out of his employment within the Workmen's Compensation Act.—In re Sanderson's Case, Mass., 113 N. E. 355.

65. **Mines and Minerals**—Waiver.—Grantee's acceptance of deed of surface, in which is excepted and reserved all coal under it and right to enter, mine and remove "said coal with all the usual mining privileges," does not waive his right of subadjacent support.—Stonegap Colliery Co. v. Hamilton, Va., 89 S. E. 305.

66. **Mortgages**—Foreclosure. — Complainant, who on foreclosure of his first and fifth mortgages, realized a sum insufficient to pay the second, third and fourth mortgages after satisfying his first mortgage, was not entitled to have the receiver appointed to collect the rents and apply them on his fifth mortgage.—Last v. Winkel, N. J., 97 Atl. 961.

67. **Municipal Corporations**—Estoppel. — A city's unqualified acceptance of services performed by one as officer estops it to invoke any rule of law to defeat payment of his salary for such period.—Thompson v. City and County of Denver, Colo., 158 Pac. 309.

68.——Police Officers.—A resident taxpayer cannot maintain injunction to restrain examination of police officers, unless his complaint shows that he is a member of the force or will suffer special injury necessary to injunction under Rev. Code, § 6643.—Larkin v. City of Butte, Mont., 158 Pac. 316.

69. **Negligence**—Attractive Nuisance. — The attractive nuisance theory is inapplicable to a four-year-old boy falling down the slope of a dump into a smoldering fire, where the place was not a playground and the dump's edge was 25 feet from the sidewalk with a fence between them.—Smith v. Illinois Cent. R. Co., Ia., 158 N. W. 546.

70. **Parent and Child**—Custody.—Upon the death of a mother who had been awarded custody of child in divorce proceedings, the father, being the natural guardian, is entitled to the custody and control of such child where the evidence shows him to be a fit person therefor.—In re Smith's Guardianship, Ia., 158 N. W. 578.

71. **Partnership**—Bankruptcy. — Where the manager, who was member of a firm, filed a petition seeking adjudication of the firm and himself as bankrupts, held, that persons who denied their membership in the firm could not complain that their separate motions to dismiss and for jury trial on the issue of membership were denied.—In re Fook Woh & Co., U. S. D. C., 232 Fed. 483.

72. **Principal and Surety**—Evidence.—In action on building contractor's bond, questions of damages for increased expense in construction by delay of principal, interest on installment of contract price to be paid obligee, expenses in lessening damages and expense in heating during delay were properly submitted to jury.—McLeod v. National Surety Co., Minn., 158 N. W. 619.

73.——Notice.—That surety company had no notice of defaults for which plaintiff made no claim, did not affect its liability for contractor's refusal to complete work of which it had immediate notice.—Lyman v. Title Guaranty & Surety Co., Utah, 158 Pac. 423.

74. **Railroads**—Police Power.—Fielder Act, § 2, by which 10 per cent of expense of eliminating grade crossing of steam railway may be ordered paid by street railway, is within police power of legislature.—Public Service Ry. Co. v. Board of Public Utility Com'rs, N. J., 98 Atl. 28.

75. **Release** — Misrepresentation. — Where plaintiff signed a release purporting to release defendant from all liability with full knowledge of contents and accepted consideration, statements of defendant's agent, which plaintiff believed, that release was not binding and was only to be used for purpose of getting plaintiff on pay roll, did not constitute legal fraud, but was misrepresentation of law.—Haviland v. Southern California Edison Co., Cal., 158 Pac. 328.

76. **Replevin**—Waiver.—In an action of claim and delivery, where defendant alleged fraud and denied right of plaintiffs to possession by contesting case upon merits, he waived right to insist upon failure of plaintiffs to make a demand.—Nixon & Wright v. Robinson, S. C., 89 S. E. 320.

77. **Sales**—Evidence.—In action for price, questions to plaintiff's husband as to who bought his business, on his testifying that he had sold it and given plaintiff the money arising therefrom, was properly excluded.—Harris v. Dover, Ga., 89 S. E. 351.

78. **Specific Performance**—Equity.—On bill for specific performance of a contract to sell house, etc., where it appeared that a defendant had taken title with knowledge of plaintiff's equitable interest therein, the right to relief in equity against such defendant was the same as against the grantor, had the conveyance not been made.—Young v. Walker, Mass., 113 N. E. 363.

79.——Statute of Frauds.—Defendant, having accepted benefits under a parol contract to purchase land by taking a deed of part of it, cannot invoke the statute of frauds to defeat specific performance as to the balance.—Strachan v. Drake, Colo., 158 Pac. 310.

80. **Street Railroads**—Safety Appliance.—A city ordinance requiring a street railway to use the most approved life guards is not complied with by use of a reasonably safe guard, or one the company approves, but it must be the best which can be used, changing with progress in construction.—Waters v. Indianapolis Traction & Terminal Co., Ind., 113 N. E. 289.

81. **Telegraphs and Telephones**—Stipulation.—A stipulation in a telegraph blank providing for notice to company within 60 days of failure to deliver a message does not conflict with statute of limitation, as it does not say when suit shall be brought.—Simpson v. Western Union Telegraph Co., S. C., 89 S. E. 321.

82. **Torts**—Attorney and Client.—In action against attorney for damages for false representations made to third person inducing such person to break his contract with plaintiff, plaintiff was required to show that by reason thereof such third person abandoned a contract which he would otherwise have performed, to plaintiff's damage.—Kock v. Burgess, Ia., 158 N. W. 534.

83. **Trusts**—Implied Trust.—There was an implied trust created in favor of a purchaser when he was allowed to enter upon the land and make improvements thereon, to the extent, at least, that the price had been paid or tendered.—Young v. Walker, Mass., 113 N. E. 363.

84. **Usury**—Mistake.—Collection of excessive interest by mistake or other error against the intent of the party, will not support a charge of usury.—American Bank v. Sublett, S. C., 89 S. E. 319.

85. **Wills**—Construction.—Whether words are precatory or imperative is immaterial in construing a primary gift, and a devise of a simple remainder by the use of the word "desire" is as effective as if the word "devise" had been used.—Keplinger v. Keplinger, Ind., 113 N. E. 292.

86.——Intent.—Neither incorrect punctuation, nor the lack of any punctuation, will control the expressed intent of the testator, and, to clear up, but not create, an ambiguity, the court may supply punctuation.—Keplinger v. Keplinger, Ind., 113 N. E. 292.

87.——Issue.—In a devise in trust to pay the income to the wife during her life, and on her death the corpus to be distributed to testator's children living at that time and the issue of any child then deceased, the word "issue" means children.—Horner v. Haase, Ia., 158 N. W. 548.

88.——Repugnancy.—While limitation repugnant to devise of fee is void, subsequent clause disposing of property on death of devisee may indicate intention to devise life estate only, where previous clause does not clearly devise fee.—Schminke v. Sinclair, Neb., 158 N. W. 458.

89. **Witnesses**—Credibility.—Where habitual use of opium or like narcotics may be shown to affect credibility, it is not ground for excluding testimony of witness, unless he was under its influence to such extent that his intellect was unbalanced when examined.—State v. Fong Loon, Idaho, 158 Pac. 233.

90.——Cross-Examination.—Defendant cannot complain of refusal of state's attorney to cross-examine him.—Jones v. State, Ga., 89 S. E. 303.